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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESSE SIERRA, JR., Appellant.	2 CA-CR 2007-0133 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20060152

Honorable Robert Duber, II, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
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V Á S Q U E Z, Judge.

¶1 After a jury trial, Jesse Sierra, Jr., was convicted of ten counts of sexual conduct with a minor. Before trial, Sierra moved to suppress statements he had made to a sheriff's detective before his arrest, claiming he had been in custody at the time and had not been advised of his rights pursuant to *Miranda*.[1] On appeal, he challenges the court's denial of his motion to suppress and his motion to strike the entire jury panel. For the reasons stated below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). For a period of approximately seven years, Sierra committed various sexual acts on A. and B. while living with them and their mother. Sierra's molestation of B. started when she was eight and continued until she was fifteen. His sexual contact with A., B.'s younger sister, began when A. was around ten years old and continued until she was thirteen. A. told her mother about the abuse after Sierra made sexual comments to two of her friends and engaged in inappropriate behavior that made them uncomfortable.

¶3 A detective with the Gila County Sheriff's office interviewed all four girls and subsequently went to Sierra's home, where he told Sierra he needed to talk to him "because of some allegations of touching." Sierra agreed to meet the detective at the sheriff's office three days later for an interview. During that interview, Sierra admitted to multiple incidents of sexual conduct with both A. and B. He was subsequently arrested and later charged with

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

fifteen counts of sexual conduct with a minor, two counts of aggravated assault on a minor under the age of fifteen, and one count of kidnapping. The court dismissed the kidnapping charge on the state's motion before trial.[2] Sierra moved to suppress the statements he had made during the interview, and the court denied his motion after holding an evidentiary hearing.

¶4 After the state rested at trial, without objection by the state, the court dismissed five of the sexual conduct counts pursuant to Rule 20, Ariz. R. Crim. P. The jury acquitted Sierra of the two aggravated assault counts but found him guilty of the remaining ten sexual conduct counts, six of which it found to be dangerous crimes against children. The court sentenced him to life imprisonment on three of the counts pursuant to A.R.S. § 13-604.01(A),[3] to mitigated, fifteen-year prison terms on six of the counts, and to a presumptive one-year prison term on the remaining count, all to run consecutively. This appeal followed; we have jurisdiction under A.R.S. § 13-4033(A).

Discussion

Motion to suppress

¶5 Sierra first argues the trial court erred in refusing to suppress statements he had made to a detective while in custody but before being given the *Miranda* warnings. In reviewing a motion to suppress, we consider only the evidence presented at the suppression

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[2]The sexual conduct counts related to his conduct with A. and B., the remaining counts to his alleged conduct with A.'s friends.

[3]This section mandates life imprisonment for offenses committed on a minor who is twelve years old or younger.

hearing and view it in the light most favorable to upholding the trial court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 30, 150 P.3d 787, 796 (App. 2007). But we review de novo the court's legal conclusions. *Id.*

¶6 "In order to be admissible, statements obtained while an accused is subject to custodial interrogation require a prior waiver of *Miranda* rights." *State v. Carter*, 145 Ariz. 101, 105, 700 P.2d 488, 492 (1985). However, the obligation to give *Miranda* warnings only arises "where there has been such a restriction on a person's freedom as to render him 'in custody.'"[4] *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *see State v. Hall*, 204 Ariz. 442, ¶ 40, 65 P.3d 90, 100 (2003). In determining whether an interrogation is custodial, we look to "the objective circumstances of the interrogation, not . . . the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994). And, we assess "whether under the totality of the circumstances a reasonable person would feel that he was in custody or otherwise deprived of his freedom of action in a significant way." *Carter*, 145 Ariz. at 105, 700 P.2d at 492. In so doing, we may consider a number of factors, including the method used to summon the defendant; the site of the questioning; whether objective indicia of arrest are present; the length and form of the interrogation; and, to the extent it is

[4]We note that, although Sierra cites several United States Supreme Court and Arizona cases for the general proposition that *Miranda* warnings must be given when a suspect is in custody, he utterly fails to provide any authority in support of his contention that, under the facts of this case, he was in custody during his questioning. *See* Ariz. R. Crim. P. 31.13(c)(1); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (appellant's brief shall contain the party's contentions and necessary supporting citations).

communicated to the defendant, whether the investigation is focused on him. *See State v. Rodriguez*, 186 Ariz. 240, 245-46, 921 P.2d 643, 648-49 (1996); *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983); *see also Stansbury*, 511 U.S. at 326 (clarifying "focus on accused" factor).

¶7 In *Carter*, a police officer followed footprints from the scene of the crime to the defendant's residence. 145 Ariz. at 104, 700 P.2d at 491. Finding that he "generally matched the physical description of the robber," officers asked Carter to accompany them to the police station. *Id.* There, although they informed him twice that he was not under arrest, he was photographed, fingerprinted, and was the subject of a "show-up" identification with witnesses to the robbery. *Id.* Under these circumstances, and given that Carter was only asked one question, our supreme court concluded he was not in custody for the hour he spent at the police station before he was ultimately arrested. *Id.* at 105-06, 700 P.2d at 492-93.

¶8 Similarly, in *Cruz-Mata*, the defendant agreed to accompany a detective from his workplace to the police station, where he was questioned for around ninety minutes. 138 Ariz. at 372, 674 P.2d at 1370. The detective told the defendant he had information that someone with the defendant's nickname had participated in the crime, that the defendant had talked about the crime, that he had been seen with blood on his clothes on the night of the crime, and that he had been observed riding in a car with other suspects. *Id.* Referring to *Mathiason* for the proposition that "confronting an accused with evidence of guilt does not necessarily require administering *Miranda* warnings," our supreme court

concluded that the defendant had not been in custody during the questioning. *Cruz-Mata*, 138 Ariz. at 373, 674 P.2d at 1371.

¶9 In *Mathiason*, the United States Supreme Court also held that "police officers are not required to administer *Miranda* warnings . . . simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." 429 U.S. at 495. In that case, police had asked the victim of a theft if she suspected anyone, and she replied the defendant was the only person she could think of. *Id.* at 493. After the officer had left his card at the defendant's residence asking him to call, they arranged to meet at the police station. *Id.* There, the officer took the defendant into an office and, after telling him he was not under arrest, closed the door. *Id.* The officer told the defendant the police believed he was involved in the burglary and—falsely—that his fingerprints had been found at the scene. *Id.* The officer also told him that "'his truthfulness would possibly be considered by the district attorney or judge.'" *Id., quoting State v. Mathiason*, 549 P.2d 673, 674 (Or. 1976). The Court concluded that, "in the absence of any formal arrest or restraint on freedom of movement," the fact that the questioning took place in a "'coercive environment'" was not sufficient to require *Miranda* warnings. *Mathiason*, 429 U.S. at 495. The Court further noted that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Id.*

¶10 Here, as in *Carter* and *Cruz-Mata*, neither Sierra nor his residence was searched, and Sierra went to the sheriff's office voluntarily. No officers drew their guns, Sierra was not handcuffed, and he was not booked upon his arrival at the sheriff's office. Indeed, in contrast to the defendants in *Carter* and *Cruz-Mata*, Sierra drove himself to the sheriff's office, three days after the detective had called on him at home. Thus, although Sierra was not explicitly told he was not under arrest, none of the "objective indicia of arrest" were present.

¶11 Nor do we see evidence that the interview itself created a custodial environment. Sierra was questioned for no more than an hour, significantly less than the ninety-minute interrogation that passed scrutiny in *Cruz-Mata*. Sierra was told he could leave the interview room to get water or go to the bathroom and could go outside to smoke. And, although the detective asked "specific [questions] . . . about the accusations that had been lodged against him by his former step-daughters" and "told [him] that he needed to be truthful . . . about certain things that he had done," the questioning was no more coercive than that approved in *Cruz-Mata* and *Mathiason*. Thus, under the totality of the circumstances present here, a reasonable person would not have felt he was "in custody or otherwise deprived of his freedom of action in a significant way." *See Carter*, 145 Ariz. at 105, 700 P.2d at 492. The trial court therefore did not err in denying Sierra's motion to suppress the statements he had made during the prearrest interview.

Motion to strike jury panel

¶12 Sierra next argues the trial court should have granted his motion to strike the jury panel because the remarks of several potential jurors tainted the other panel members. "[E]ither party may challenge the entire jury panel on the ground that 'in its selection there has been a material departure from the requirements of law.'" *State v. Davis*, 137 Ariz. 551, 558, 672 P.2d 480, 487 (App. 1983), *quoting* Ariz. R. Civ. P. 18.4(a). However, we will not set aside a trial court's ruling on such a challenge "[a]bsent a clear showing of abuse of [it]s wide discretion." *State v. Duke*, 110 Ariz. 320, 323, 518 P.2d 570, 573 (1974). Furthermore, the party challenging the panel "has the burden of showing . . . either that the jury was unlawfully empaneled or that the jurors could not be fair and impartial." *Davis*, 137 Ariz. at 558, 672 P.2d at 487.

¶13 In *Duke*, our supreme court found no error in the trial court's failure to strike the jury panel in a murder case. There, a juror stated during voir dire that she had known the victim of what was apparently a notorious and highly publicized murder and then "became emotional and began to cry." 110 Ariz. at 323, 518 P.2d at 573. Similarly, in *State v. Rose*, 121 Ariz. 131, 139-40, 589 P.2d 5, 13-14 (1978), a kidnapping case, the supreme court concluded the defendant had failed to meet his burden of showing the panel was prejudiced by a juror's disclosure that "an armed hitchhiker left him bound [i]n the desert and stole his car." Noting that the trial court "had a duty . . . to ascertain if the experience would serve as a reason to challenge [the juror] for cause," the court determined

that "[t]he facts elicited by the [trial] court were not so excessive as to necessarily prejudice the other veniremen." *Id.*

¶14 And, in *Davis*, a child molestation case, several jurors expressed concerns during voir dire about participating in the case. 137 Ariz. at 554, 672 P.2d at 483. One of the jurors said he had strong feelings about child molestation, "might be prejudiced" because he had a young daughter, and was afraid he might "let somebody off who did not deserve to be off" because of the rules governing the admission of evidence of prior offenses. *Id.* at 555-56, 672 P.2d at 484-85. A second juror said he could not be open-minded, given his experience in counseling parents in such cases. *Id.* at 557, 672 P.2d at 486. And a third stated he had "a very definite bias against this type of situation regardless of innocent or guilty" and referred to "a feeling inside that bothers me about the particular situation." *Id.* In that case, the trial court twice questioned the entire panel about any possible prejudice resulting from the statements of their fellow prospective jurors, and the only individual who responded was excused for cause. *Id.* at 558, 672 P.2d at 487. Division One of this court thus concluded the defendant had failed to meet his burden of showing that the panel had been prejudiced by the jurors' remarks. *Id.*

¶15 Here, as in *Davis*, a number of jurors indicated during voir dire that they might be prejudiced because of the nature of the case, while others reported some sort of past experience with sexual molestation, either personally, professionally, or vicariously through a family member. Sierra moved the court to strike the entire panel, arguing it had been tainted by "the fact that many jurors talked about being molested themselves, [and because]

. . . several members of the jury . . . were very emotional in regards to their recantation [sic] of what happened to them."

¶16 We find nothing in the record to suggest the statements "clearly had a negative effect on the entire panel," as Sierra argues, and thus find no abuse of the trial court's discretion in denying Sierra's motion. Although the number of statements was remarkable—twenty-eight prospective jurors had some form of direct or indirect past experience with sexual molestation—none of those jurors' statements provided even the minimal level of detail that passed scrutiny in *Duke* and *Rose*.[5] Moreover, the trial court was in the best position to assess any emotional impact those statements may have had on the rest of the panel; it could consider the jurors' words and "facial expressions, coupled with vocal inflections," which are not observations we can make "from a lifeless transcript." *See State v. Sparks*, 147 Ariz. 51, 54, 708 P.2d 732, 735 (1985).

¶17 Sierra also argues the court "should have questioned people privately, and also asked the remaining jurors if they were influenced by the statements of numerous jurors who were excused from service because of their history of sexual molestation."[6] Unlike the trial court in *Davis*, the court here did not explicitly ask those jurors who were not excused

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[5]Sierra does not identify any particular statements as being prejudicial. However, the responses included: "I have a close family member who was molested by a family member. I would like to be out of here right now," and "My youngest daughter was molested by a pedophile. I don't think I could be fair." More typical were more general remarks such as: "I have had personal involvement with a child molestation case," and "I have had a life experience [of] this nature."

[6]Sierra provided no authority in support of this argument.

whether they had been influenced by the remarks of their fellow veniremen. But the court stressed on three separate occasions that jurors must be able to be "fair and impartial" and asked if any of them "would have difficulty doing that." Moreover, the court excused all those on the panel who expressed doubts about their ability to be unbiased. Therefore, even if it would have been better practice for the court to have questioned jurors privately, Sierra has failed to show that "any . . . juror, let alone the entire jury panel, was prejudiced." *See Rose*, 121 Ariz. at 140, 589 P.2d at 14. Thus, the trial court did not err in denying Sierra's motion to strike the panel.

Disposition

¶18 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge